



DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 697

[Docket No. 080219213-4259-02]

RIN 0648-AT31

Atlantic Coastal Fisheries Cooperative Management Act Provisions; American Lobster Fishery

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: With this final rule, NMFS implements new Federal American lobster regulations that will control lobster trap fishing effort by limiting access into the lobster trap fishery in two Lobster Conservation Management Areas. Additionally, this action will implement an individual transferable trap program in three Lobster Conservation Management Areas. The trap transfer program will allow Federal lobster permit holders to buy and sell all or part of a permit's trap allocation, subject to certain restrictions. The limited entry and trap transfer programs respond to recommendations for Federal action in the Atlantic States Marine Fisheries Commission's Interstate Fishery Management Plan for American Lobster.

DATES: Effective May 7, 2014.

Applicability Dates: Applications for Area 2 and the Outer Cape Area lobster trap fishery eligibility are due November 3, 2014. Eligibility decisions will become effective no earlier than the start of the 2015 Federal lobster fishing year, which begins May 1, 2015. NMFS

will file a separate notice indicating when the Trap Transfer Program will begin.

Implementation of the Trap Transfer Program at § 697.27 is contingent upon the completion of a database currently under development by the Atlantic States Marine Fisheries Commission.

Once the database is complete, NMFS will notify the public and inform Federal lobster permit holders how to enroll into the program. Although the timing may allow permit holders to buy and sell transferable traps during the 2014 calendar year, those transfers will become effective no earlier than the start of the 2015 Federal lobster fishing year, which begins May 1, 2015.

ADDRESSES: Copies of the American Lobster Final Environmental Impact Statement (FEIS), including the Regulatory Impact Review (RIR) and the Final Regulatory Flexibility Analysis (FRFA) prepared for this regulatory action, are available upon written request to Peter Burns, Fishery Policy Analyst, Sustainable Fisheries Division, NMFS, 55 Great Republic Drive, Gloucester, MA 01930, telephone (978) 281-9144. The documents are also available online at <http://www.nero.noaa.gov/sfd/lobster>.

You may submit written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this final rule to the mailing address listed above and by e-mail to OIRA_Submission@omb.eop.gov, or fax to (202) 395-7285.

FOR FURTHER INFORMATION CONTACT: Peter Burns, Fishery Policy Analyst, phone (978) 281-9144.

SUPPLEMENTARY INFORMATION:

Statutory Authority

These regulations modify Federal lobster fishery management measures in the Exclusive Economic Zone (EEZ) under the authority of section 803(b) of the Atlantic Coastal Fisheries Cooperative Management Act (Atlantic Coastal Act) 16 U.S.C 5101 et seq., which states that, in

the absence of an approved and implemented Fishery Management Plan under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) (16 U.S.C. 1801 et seq.), and after consultation with the appropriate Fishery Management Council(s), the Secretary of Commerce may implement regulations to govern fishing in the EEZ, i.e., from 3 to 200 nautical miles (nm) offshore. The regulations must be (1) compatible with the effective implementation of an Interstate Fishery Management Plan (ISFMP) developed by the Atlantic States Marine Fisheries Commission (Commission), and (2) consistent with the national standards in section 301 of the Magnuson-Stevens Act.

Background

The American lobster resource and fishery is managed by the states and Federal Government within the framework of the Commission. The role of the Commission is to facilitate cooperative management of interjurisdictional fish stocks, such as American lobster. The Commission does this by creating an ISFMP for each managed species or species complex. These plans set forth the management strategy for the fishery and are based upon the best available information from the scientists, managers, and industry. The plans are created and adopted at the Commission Management Board level—e.g., the Commission’s Lobster Board created the Commission’s Lobster Plan—and provide recommendations to the states and Federal Government that, in theory, allow all jurisdictions to independently respond to fishery conditions in a unified, coordinated way. NMFS is not a member of the Commission, although it is a voting member of the Commission’s species management boards. The Atlantic Coastal Act, however, requires the Federal Government to support the Commission’s management efforts. In the lobster fishery, NMFS has historically satisfied this legal mandate by following the Commission’s Lobster Board recommendations to the extent possible and appropriate.

The Commission has recommended that trap fishery access be limited in all Lobster Conservation Management Areas (Areas). The recommendations are based in large part on Commission stock assessments that find high lobster fishing effort as a potential threat to the lobster stocks. Each time the Commission limits access to an area, it recommends that NMFS similarly restrict access to the Federal portion of the area. NMFS received its first limited access recommendation in August 1999, when the Commission limited access to Areas 3, 4, and 5 in Addendum I. NMFS received its most recent limited access recommendation in November 2009, when the Commission limited access to Area 1 in Addendum XV. NMFS has already completed rules that limit access to Areas 1, 3, 4, and 5. This final rule responds to the Commission's limited access recommendations for Area 2 and the Outer Cape Area. It also responds to the Commission's recommendation to implement a Trap Transfer Program in Areas 2, 3, and the Outer Cape Area. The specific Commission recommendations, and NMFS' response to those recommendations, are the subject of this final rule.

NMFS published a proposed rule for this action on June 12, 2013 (78 FR 35217). We received public comments from seven different entities in response to the proposed rule, and all the comments, generally, supported the measures in the proposed rule. In addition to the comments submitted in response to the proposed rule, two entities submitted comments in response to another Federal lobster action outside of the proposed rule comment period, but because some of those comments are relevant to trap transferability and other measures under consideration in this action, NMFS has considered them in the preparation of this final rule. Overall, NMFS received 17 comments submitted by 8 different commenters. All comments and responses are set forth later in this final rule (see Comments and Responses).

This final rule implements the following measures.

1. Outer Cape Area Limited Access Program

NMFS will limit access into the Outer Cape Area in a manner consistent with the Commission's recommendations. NMFS will qualify individuals for access into the Outer Cape Area based upon verifiable landings of lobster caught by traps from the Outer Cape Area in any one year from 1999–2001.

NMFS will also allocate Outer Cape Area traps according to a Commission regression analysis formula that calculates effective trap fishing effort based upon verifiable landings of lobster caught by traps from the Outer Cape Area in any one year from 2000–2002. The use of the regression formula removes the possibility that someone will benefit from simply reporting more traps than were actually fished.

NMFS will accept two types of appeals to its Outer Cape Area Limited Access Program. The first appeal is a Clerical Appeal. The second is a Director's Appeal.

The Clerical Appeal will allow NMFS to correct clerical and mathematical errors that sometimes inadvertently occur when applications are processed. It is not an appeal on the merits, and will involve no analysis of the decision maker's judgment. Accordingly, the appeal will not involve excessive agency resources to process. Requests for Clerical Appeals must be made by the applicant directly to NMFS.

The Director's Appeal will allow states to petition NMFS for comparable trap allocations on behalf of Outer Cape Area applicants denied by NMFS. The appeal will only be available to Outer Cape Area applicants for whom a state has already granted access. The state will be required to explain how NMFS' approval of the appeal would advance the interests of the Commission's Lobster Plan. The rationale for this appeal is grounded in the desire to remedy regulatory disconnects. NMFS knows that states have already made multiple separate decisions

on qualification, allocation, and at least in some instances, trap transfers for the state portion of dually permitted fishers. The Director's Appeal will help prevent the potential damage that such a mismatch between state and Federal data could create. Requests for Director's Appeals must be made by the director of a state fishery management agency to NMFS. Requests for Director's Appeals will not be accepted directly from applicants.

The final rule also adopts the Commission's 2-month winter trap haul-out recommendation. The 2-month closure will take place January 15 through March 15. The 2-month closure will require the removal of all traps from Outer Cape Area waters from January 15 through March 15. The 2-month closure date aligns with Massachusetts' 2-month closure dates.

2. Area 2 Limited Access Program

NMFS will limit access into Area 2 in a manner consistent with the Commission's recommendations. NMFS will qualify individuals for access into Area 2 based upon verifiable landings of lobster caught by traps from Area 2 from 2001-2003. NMFS will also allocate traps according to a Commission formula that calculates effective trap fishing effort based upon landings during 2001, 2002, and 2003.

NMFS will also restrict allowable landings to those from ports in states that are either in or adjacent to Area 2, i.e., Massachusetts, Rhode Island, Connecticut, and New York. The Commission, in Addendum VII, found that the location of Area 2 prevented fishers from far away ports from actively fishing in Area 2. NMFS agrees with the Commission's conclusion.

For the Area 2 Limited Access Program only, NMFS will also adopt the Commission's recommended Hardship Appeal. Specifically, if an Area 2 fisher had been incapable of fishing during the 2001-2003 fishing years due to documented medical issues or military service, NMFS will allow that individual to appeal the qualification decision on hardship grounds, allowing the

individual to use landings from 1999 and 2000 as the basis for qualification. NMFS will also allow a Director's Appeal and a Clerical Appeal, as described above.

3. Timeline for Outer Cape and Area 2 Limited Access Program

Federal lobster permit holders may submit applications for Area 2 and Outer Cape Area eligibility during a 6-month period beginning May 7, 2014, and ending November 3, 2014.

NMFS will review the applications and notify applicants of their eligibility and trap allocations during the 2014 Federal fishing year, and those decisions will take effect at the start of the 2015 Federal fishing year, on May 1, 2015. All Federal lobster permit holders may elect Area 2 and/or the Outer Cape Area on their 2014 Federal lobster permit and fish with traps in these areas during the 2014 Federal fishing year, which begins May 1, 2014, and ends April 30, 2015.

However, starting May 1, 2015, only those with qualified permits may designate and fish in Area 2 and/or the Outer Cape Area.

This final rule requires that all qualification applications for the Area 2 and Outer Cape Area limited access program must be submitted by November 3, 2014. Late applications will not be considered.

4. Individual Transferable Trap Program (ITT, Trap Transfer Program)

NMFS will implement an optional Trap Transfer Program for Areas 2, 3, and the Outer Cape Area in a manner consistent with the Commission's recommendations. The Program will allow qualified permit holders to sell portions of their trap allocation to other Federal lobster permit holders. Buyers can purchase traps up to the area's trap cap, with 10 percent of the transferred allocation debited and retired from the fishery as a conservation tax. The Trap Transfer Program affords buyers and sellers the flexibility opportunity to scale their businesses to optimum efficiency.

Under the Trap Transfer Program, NMFS will allow a dual state and Federal permit holder to purchase Federal trap allocation from any other dual Federal lobster permit holder. NMFS will require that the transferring parties' state/Federal allocation be synchronized at the end of the transaction. A dual permit holder can purchase a Federal allocation from an individual in another state, as well as an equal state-only allocation from a third individual in his or her own state for the purpose of matching the purchaser's state and Federal trap allocations. Any participants holding both state and Federal lobster permits ("dual permit holders") with different trap allocations must agree to abide by the lower of the two trap allocations to take part in the program. In this way, permit holders will not be obliged to forfeit their higher trap allocation, but they will not be able to participate in the Trap Transfer Program if they choose to retain it. This will synchronize the dual permit holder's allocations at the initial opt-in time, thus greatly facilitating the tracking of the transferred traps. As trap allocations are transferred, a centralized Trap Transfer Database accessible by all jurisdictions will keep track of trap transfers, thus ensuring that all jurisdictions are operating with the same numbers at the beginning and end of every trap transfer period. The centralized Trap Transfer Database is created by the Atlantic Coastal Cooperative Statistics Program (ACCSP) and is a critical, foundational prerequisite to the Trap Transfer Program.

The timeline to submit an application for the Trap Transfer Program for its first year will be announced in a separate Federal Register notice once NMFS is assured that the Commission's Trap Tag Database is fully functional.

Comments and Responses

NMFS received 17 comments relevant to this action. During the proposed rule comment period from June 12, 2013, through July 29, 2013, NMFS received multiple comments from

seven persons or entities, which are broken down as follows: One from a Massachusetts lobster fisher; one from a Rhode Island lobster fisher; one from a New Jersey lobster fisher; one from the Rhode Island Lobstermen's Association; one from the Atlantic Offshore Lobstermen's Association; one from the Maine Lobstermen's Association; and one from the Atlantic States Marine Fisheries Commission. All seven of these commenters supported the proposed rule. In addition to the comments received in direct response to the proposed rule, NMFS received a second comment letter from the Commission and a comment from a Board member who is the Director of the Connecticut Department of Environmental Protection. Both submissions were sent in response to a separate NMFS lobster action and received after the proposed rule comment period had closed. However, because the proposed rule comment period did not coincide with any of the Commission's regularly scheduled Lobster Management Board meetings, the Board was not able to meet as a group and discuss the proposed rule until after the comment period ended. With respect to this timing, and given the relevance of these comments to the final rule measures, the comments were considered in the development of this action, and NMFS' responses are provided in this section. The specific comments and responses are as follows.

Comment 1: Two industry associations, the Commission, and one individual lobster fisher commented in support of a 10-percent allocation tax on full business transfers. A full business transfer refers to the transfer of a Federal lobster fishing permit and all of its trap allocation to another vessel. The Commission suggested that the transfer tax on full business transfers could result in fewer vertical lines in the water, which could benefit right whales, as well as assist in the rebuilding of the Southern New England (SNE) lobster stock.

Response: NMFS will not require a 10-percent trap allocation reduction on full business transfers at this time. The Commission's Lobster Plan is presently not designed to accommodate

such a measure. The measure presupposes that the transferring lobster permit holder will have an allocation to debit by 10 percent. While that is the case in most lobster management areas (those for which qualified permit holders are allocated a number of traps based on their fishing history), it is not true for Area 1, which is by far the largest lobster area both in terms of participants and business transfers conducted. Area 1 has only a trap cap, and anyone with a Federal lobster permit that qualified for Area 1 may fish up to 800 traps in Area 1; therefore, there is no trap allocation to debit. NMFS' proposed rule specifically asked for comment on this issue, and neither Maine nor the Commission asked NMFS to convert the Area 1 trap cap to an individual allocation. Nor did Maine indicate that it would change its trap cap in state waters to an individual trap allocation, which would be necessary to ensure consistency and prevent regulatory disconnects between Maine and NMFS. See response to Comment 5 for additional discussion of this issue.

Comment 2: One lobster fisher commented that failure to implement a full business transfer tax might lead to manipulation of a transfer to avoid the tax. The individual suggested taxing full business transfers only in the areas where transferability occurred.

Response: NMFS disagrees. Lobster permits are not area specific. Federal permit holders can choose to fish in any or all areas for which they are qualified. Permit holders change designations year-to-year; e.g., a permit holder might designate Areas 2 and 3 one year, Area 1 the next year, and non-trap (mobile gear) fishing the third. This ability to choose multiple areas and change them year-to-year highlights the interconnectedness of the areas and why management measures should not be considered in the vacuum of a single area. Limiting permit holders to a single area—in this instance, to separate out Area 1 fishers so that a transfer tax can occur in other areas—might simplify management and reduce opportunities to manipulate the

system, but it would also restrict lobster business flexibility. On balance, NMFS has determined that the potential benefits of such a measure do not outweigh the cost in reduced flexibility.

Comment 3: One lobster fisher and one industry association commented that transfer taxes, such as a 10-percent tax on full business transfers, were a useful tool to prevent the activation of latent effort. A different association and different lobster fisher, however, suggested that past trap cuts and the future Addendum XVIII trap cuts created a relatively lean industry such that a significant activation of latent effort was unlikely.

Response: NMFS does not expect this final rule to increase effort and, therefore, a tax on full business transfers is not necessary to prevent the activation of latent effort. Further, existing trap caps and the 10-percent trap transfer tax provide additional assurance that effort will not increase, as does the Commission's Addendum XVIII trap cuts that the states have implemented and which NMFS proposed (see Advanced Notice of Proposed Rulemaking (78 FR 51131, August 20, 2013)). NMFS discussed the issue of latent trap activation and trap transferability in detail in its proposed rule responses to Comments 7, 13, and 14 (78 FR 35217, June 12, 2013) and those responses remain relevant.

Comment 4: Two people commented in opposition to taxing full business transfers. One of the individuals stated that an owner should be able to transfer a permit in and out of Confirmation of Permit History and among vessels owned by the person without the allocation being taxed. The other individual commented that the taxing of full business transfers could have unintended consequences insofar as an operative definition of "business" is unknown and might be interpreted to encompass transfers that industry would not want covered, such adding immediate family members as co-owners or incorporating the business.

Response: This final rule does not tax full business transfers.

Comment 5: One association supported NMFS' proposed Trap Transfer Program, but expressed concern that Program participants from Area 1 would have to forfeit their Area 1 permits. The association suggested that Area 1 permit holders be excluded from implementation of this initial phase of the Trap Transfer Program, but that NMFS allow for future change to the rule in the event that Area 1 adopts permit-based allocations instead of the current trap cap.

Response: This final rule implements the Trap Transfer Program as proposed. Federal lobster permits are not assigned specific fishing areas; fishers with permits can fish with traps in any area for which they have qualified, or fish with non-trap gear anywhere in the EEZ. As such, there is no such thing as a separate Federal "Area 1 permit." Further, the final rule does not automatically disqualify Area 1 participants upon entry into the Trap Transfer Program. Permit holders can purchase allocation and remain qualified for Area 1 and many may choose to do so (e.g., Area 1 individuals with a small Area 3 allocation may seek additional Area 3 allocation in order to designate Areas 1 and 3 on their license without the Most Restrictive Rule making such a designation economically unfeasible). Area 1 qualifiers would, however, forfeit their Area 1 eligibility if they choose to sell traps. As discussed in the response to Comment 1, there is presently no way to debit Area 1 traps and prevent an expansion of fishing effort other than to altogether restrict that person from fishing in Area 1 in such a circumstance. On balance, NMFS asserts the Program benefits to Area 1 trap buyers outweigh the negatives to Area 1 trap sellers. Selling traps is optional and may, in some circumstances, represent the best course of action for an Area 1 business. The rule allows Area 1 qualifiers to weigh the consequences, analyze what is best for them, and act accordingly.

Comment 6: One business association and one lobster fisher opposed the proposed rule's treatment of multi-area trap history, commenting that transferred allocation should retain its

history and that trap transfer recipients should be allowed to fish in any area for which that trap allocation qualified. A different association supported the proposed rule, commenting that the recipient of allocation with multi-area trap history should be required to choose a single area, but that the allocation's multi-area history be retained in the lobster database. The Commission wrote in favor of allowing those who purchase traps with multi-area history to fish the traps in all the areas for which they are qualified.

Response: This final rule allows recipients of trap allocations with multi-area history to retain and use that trap history to fish in multiple areas. This is a change from the proposed rule, which proposed that transfer recipients of multi-area allocation had to forever assign a single area to that allocation. The change provides lobster businesses with greater flexibility to potentially fish in multiple areas. The proposed version followed Commission Addendum XII, which recommended paring down a multi-area trap allocation to a single area. Addendum XII's recommendation was predicated on a perceived need to keep things simple for the Trap Tag Database. Since that time, however, the ACCSP's Lobster Trap Transfer Database subcommittee indicated that it can develop a database that can track multi-area trap allocation history. With that new development, the Commission rescinded its Addendum XII recommendation on August 6, 2013, when it approved Addendum XXI. Addendum XXI incorporates into the Lobster Plan a provision to allow the declaration of multi-area history for transferred traps. To be compatible with Addendum XXI, the final rule withdraws this proposed requirement and retains the status quo; i.e., trap fishers can fish traps in all the areas for which the trap has qualified.

Comment 7: Commenters universally supported the need for a centralized database that can keep track of all permit allocations and transfers. These commenters generally indicated that

the database needs to be fully functional and tested before transferability can begin. One association went so far as to state that transferability cannot be expected to progress without it.

Response: NMFS agrees and has repeatedly stated at Commission Lobster Board meetings that a fully developed and properly functioning trap allocation database is a necessary prerequisite to any trap transfer program.

Comment 8: One lobster fisher commented that, although the database needs to be fully functioning prior to the start of a trap transfer program, the database should not be allowed to hold up the implementation of trap transferability and that NMFS be forceful in making sure the database is completed and tested on time.

Response: NMFS agrees that the database must be fully functional prior to the start of the Trap Transfer Program and understands that the industry wants the Trap Transfer Program in place as soon as possible.

NMFS will begin the qualification and allocation process for Federal lobster permits in Area 2 and the Outer Cape Area. The final rule also sets forth the Trap Transfer Program. When the completion and release date of the database is known, NMFS will file a subsequent notice that will establish the timeline and effective dates for the Trap Transfer Program.

Comment 9: One lobster fisher commented that the Addendum XVIII trap cuts will potentially be devastating to industry and that they need the Trap Transfer Program to mitigate the trap cut impacts.

Response: This final rule establishes the Trap Transfer Program; however, the effective date for this program has been postponed pending the completion of the Trap Transfer Database. The proposed trap cuts are the subject of a separate rulemaking action, and NMFS intends to coordinate the timing of the Trap Transfer Program to allow fishermen to utilize it as a means of

mitigating the potential economic effects of the proposed trap cuts. NMFS has no plans to implement the trap cuts prior to full implementation of the Trap Transfer Program.

Comment 10: Commenters universally supported the Trap Transfer Program and urged that it be implemented as soon as possible.

Response: NMFS agrees and intends to implement the Trap Transfer Program as soon as it is reasonable and practicable.

Comment 11: One association commented that trap cuts should precede transferability so that “inactive traps don’t get reactivated.”

Response: One potential benefit to having trap cuts precede transferability is that the trap cuts would remove effort—including potentially latent effort—before it could be transferred. However, NMFS does not expect the activation of latent effort to be a significant issue in this matter (see response to Comment 3). Given that latent effort is not expected to be significant, NMFS is implementing the Trap Transfer Program in this action; any trap reductions will be implemented through a separate rulemaking.

Comment 12: One association said that trap cuts should happen after transferability; a different commenter offered that cutting traps during transferability was also a viable option.

Response: NMFS is establishing the Trap Transfer Program through this action, to be effective as soon as practicable. Under a separate rulemaking action, NMFS will analyze various options for the implementation of the trap cuts in consideration of the Trap Transfer Program.

Comment 13: A number of commenters suggested that NMFS extend the trap tag expiration date and delay the issuance of trap tags beyond the new fishing year so that new trap allocations, trap cuts, and the next trap tag cycle can become linked.

Response: NMFS disagrees, and this final rule takes no steps to extend the trap tag expiration date or to delay the issuance of trap tags. Variables such as the trap tag ordering dates (February for Federal permit holders, December for Massachusetts, and other months for other states) and differing start dates for the fishing year (May 1 for Federal permit holders, January 1 or July 1 for the states) illustrate the tremendous logistical challenge that exists to begin a new program in a coordinated fashion. However, NMFS does not consider extending the trap tag expiration date to be necessary. Most commenters' desire to hurry transferability and/or to alter variables such as trap tag issuance is so lobster fishers will not be forced to endure trap cuts while waiting for the NMFS Trap Transfer Program to be finalized. Addendum XVIII states that trap cuts cannot be enacted until NMFS implements its transferability plan. The final rule anticipates that date to be the start of the 2015 Federal fishing year, which will provide sufficient time to account for trap cuts and process transferred trap allocation.

Comment 14: Numerous commenters supported allowing buyers to purchase allocation above an area trap cap, which would be unfishable, but which could be drawn upon and activated if trap cuts lowered a fisher's allocation below the cap.

Response: This concept—referred to as “trap banking” in earlier Commission documents—was approved for Area 2 in Addendum XXI in August 2013, and for Area 3 in Addendum XXII in October 2013. NMFS plans to consider trap banking under a separate future rulemaking. NMFS analyzed the issue preliminarily in its FEIS and concluded that implementing the Trap Transfer Program without trap banking will not undermine the Trap Transfer Program, nor would it necessarily prevent trap banking from being added to the Program in the future if the Commission decided to recommend such.

Comment 15: One association and one lobster fisher commented in support of increasing the Area 3 trap cap to 2,000 traps. The Commission's Lobster Board adopted the 2,000 trap cap for Area 3 in Addendum XIV to the Lobster Plan on May 5, 2009, and perpetuated this measure when it approved Addendum XXI on August 6, 2013. Addendum XXI adopted a 5-year trap cap reduction schedule for Area 3, starting at 2,000 traps. Consequently, the Commission recommended that NMFS align with the Area 3 trap cap to coincide with the 2,000-trap cap in the Lobster Plan.

Response: This final rule will not change the Area 3 trap cap in the Federal regulations, which is currently set at 1,945 traps. The FEIS for this action did not analyze the change in the trap cap for Area 3, and NMFS is analyzing this measure in concert with the trap reductions for Area 2 and Area 3, as well as the other measures adopted by the Commission in Addenda XVII and XVIII, which were intended to address the recruitment failure in the SNE lobster stock. NMFS asserts that the adoption of the 2,000-trap cap should be assessed within the context of the 5-year trap cap reductions under Addendum XVIII, which are outside the scope of this rulemaking.

Comment 16: The Connecticut Department of Environmental Protection recommended that the trap transfer process be conducted in a manner that allows for the fair participation of all citizens, and should be done in an open forum and in conjunction with the Commission's Trap Transfer Database.

Response: NMFS intends for the Trap Transfer Program to be open and accessible. The Program, however, is new, and participant behavior and response is unknowable at this point. NMFS does not want to introduce variables that could engineer market behavior in response to a problem that may not exist. NMFS will monitor its Trap Transfer Program and agrees with the

commenter that the agency should, and will, work with the Commission to investigate ways to make available transferable trap allocations known and accessible to participants.

Comment 17: The Commission agreed that all Federal lobster permit holders be allowed to purchase transferable trap allocations for Areas 2, 3, and the Outer Cape Area.

Response: NMFS agrees and adopted this measure as part of the Trap Transfer Program to allow those Federal lobster permit holders who do not initially qualify for the trap fishery in these areas to obtain access through the purchase of transferable traps.

Changes from the Proposed Rule

NMFS made some minor changes to the final rule to allow for more consistency with the Commission's Plan and to facilitate the administrative effectiveness in carrying out the new measures.

The proposed rule would have restricted the buyer of a trap with a multi-area history to electing only one management area in which to fish that trap, with the history in the other areas retired permanently. Instead, this final rule continues the status quo, which allows a Federal lobster permit holder to elect any and all areas for which the transferred traps have history. NMFS did not receive any comments to suggest that the retention of multi-area trap history be disallowed, and members of the industry wrote in support of retention of multi-area trap history.

The proposed rule suggested that trap transferability would begin 150 days after the publication of the final rule. However, the completion date of the Commission's Trap Transfer Database remains uncertain. Therefore, although this final rule establishes the Trap Transfer Program, the exact dates for the administrative transfer of traps (trap transfer period) will be announced in a subsequent Federal Register notice once NMFS has full assurance that the database is ready to track and administer trap transfers by dual permit holders. Depending on the

availability of the database, Federal lobster permit holders may be able to transfer traps beginning in the fall of 2014, with those transactions taking effect on May 1, 2015.

Finally, NMFS made minor changes to the regulatory text in § 697.19(b) through (f) to clarify that Federal lobster vessels with trap gear designations for Areas 2, 3, 4, 5, and the Outer Cape Area are limited to the number of traps allocated by the Regional Administrator and, although this allocation may vary, in no case shall it exceed the trap limit.

Classification

The Administrator, Greater Atlantic Region, NMFS, determined that this final rule is necessary for the conservation and management of the American lobster fishery and that it is consistent with the provisions of the Atlantic Coastal Act, the National Standards of the Magnuson-Stevens Act, and other applicable laws.

NMFS prepared an FEIS for this action. The FEIS was filed with the Environmental Protection Agency on December 13, 2013. A notice of availability was published on December 20, 2013 (78 FR 77121). In approving this action, NMFS issued a record of decision (ROD) identifying the selected alternatives. A copy of the ROD is available from NMFS (see ADDRESSES).

This final rule has been determined to be not significant for the purposes of Executive Order (E.O.) 12866.

A FRFA was prepared for this action. The FRFA incorporates the IRFA, a summary of the significant issues raised by the public comments in response to the IRFA, and NMFS' responses to those comments, and a summary of the analysis completed to support the action. A copy of this analysis is available from NMFS (see ADDRESSES). A summary of the FRFA follows.

Summary of the Significant Issues Raised by the Public in Response to the IRFA, a Summary of the Agency's Assessment of Such Issues, and a Statement of All Changes Made in the Final Rule as a Result of Such Comments

None of the public comments we received regarding this rulemaking action raised any significant or new issues that resulted in NMFS changing course with respect to the major elements of the proposed rule. We received a total of 17 comments from 8 different commenters, and all generally supported the implementation of a limited access program for the Area 2 and Outer Cape Area and the Trap Transfer Program. None of the comments raised any significant issues with the IRFA or its supporting analyses. For a complete description of the comments received and NMFS's responses to those comments, see the COMMENTS AND RESPONSES section of this preamble.

Description and Estimate of the Number of Small Entities to Which the Final Rule Applies

The regulated entities affected by this action include small entities engaged in the commercial lobster trap fishery. On June 20, 2013, the Small Business Administration (SBA) issued a final rule revising the small business size standards for several industries, effective July 22, 2013 (78 FR 37398). That final rule increased the small entity size standard based on gross sales for finfish fishing from \$4 million to \$19 million, shellfish fishing from \$4 million to \$5 million, and other marine fishing from \$4 million to \$7 million. Pursuant to the RFA, and prior to SBA's June 20, 2013, final rule, a FRFA analysis was conducted for this action using SBA's former size standards. NMFS has reviewed the analyses prepared for this action in light of the new standards. NMFS has determined that the new size standards do not affect the analyses prepared for this action because all Federal lobster permit holders remain categorized as small entities under both the old and new SBA small business size standards.

This final rule would potentially affect any fishing vessel using trap gear that holds a Federal lobster permit. Despite the increase in the threshold for the SBA size standard for commercial fishing, all operating units in the commercial lobster fishery are considered small businesses for the purposes of this FRFA. According to dealer records no single lobster vessel would exceed \$4 million in gross sales. In 2012, there were a total of 3,047 Federal lobster permits, of which 2,750 were active. The remaining 297 were in Confirmation of Permit History status and, therefore, inactive. Of those active permits in 2012, 575 were issued a non-trap only lobster permit, 1,860 were issued a trap only lobster permit, and 315 were issued both a non-trap and trap gear designation. Some individuals own multiple operating units, so it is possible that affiliated vessels would be classified as a large entity under the SBA size standard. However, the required ownership documentation submitted with the permit application was not adequate to reliably identify affiliated ownership. Therefore, all operating units in the commercial lobster fishery are considered small entities for purposes of analysis.

Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

This final rule contains a collection of information requirement subject to review and approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA). A PRA analysis, including a revised Form 83i and supporting statement, have been reviewed and approved under OMB control number 0648-0673. There are five types of respondents characterized in the PRA analysis. Group 1 applicants are those for whom NMFS has data on hand to show that their permits meet the eligibility criteria for one or both of the Outer Cape Area and Area 2. These permit holders will still need to apply by submitting an application form to NMFS agreeing with the NMFS assessment of their eligibility based on the state data. Group 2 applicants are the subset of Group 1 pre-qualifiers who do not agree with the

NMFS pre-determination of the areas for which they are eligible and/or the corresponding trap allocations. These applicants will be required to submit the application form, but would also need to provide additional documentation to support their disagreement with NMFS' assessment of their permits' eligibility. Group 3 applicants are those Federal lobster permit holders for whom there are no state data available to show that their permits meet the eligibility criteria for either Area 2 or the Outer Cape Area and who, consequently, have no trap allocation for either area based on NMFS's review of the state-supplied data. Permit holders in this group may still apply for eligibility, but must submit, along with their application forms, documentation to support their claim of eligibility and trap allocation for the relevant areas. Group 4 applicants are those who apply for access to either Area 2 and/or the Outer Cape Area, are deemed ineligible (a subset of Groups 2 and 3), and appeal the decision based on a military, medical, or technical issue. Group 5 applicants consist of those who fall under the Director's Appeal.

Description of the Steps the Agency Has Taken To Minimize the Economic Impact On Small Entities Consistent With The Stated Objectives of Applicable Statutes

NMFS took several steps to minimize the burden of this action on small entities. First, we deferred the implementation of the Trap Transfer Program until the Commission's Trap Transfer Database is proven to be ready to track the transfers. The database is critical to the effective implementation of the Program and critical to allowing the necessary communication between NMFS and the states to be sure that the transfers are administered properly. Allowing transferability to begin prior to the completion of the database would have increased the likelihood of problems in the tracking of the transfers, which could inconvenience permit holders and severely complicate the trap transfer process. Further, the Program will give ample time for permit holders to plan for their trap transfer transactions. It will give time for trap buyers to

locate trap sellers, negotiate a price, make an agreement, and have that agreement affirmed by the affected states and NMFS so that the new allocations can be easily effectuated at the start of the 2015 Federal fishing year.

Second, NMFS will allow all Federal lobster permit holders to maintain their ability to elect to fish with traps in Area 2 and the Outer Cape Area during the entire 2014 fishing year while NMFS makes qualification and allocation decisions on applications for these areas. This will allow for a more seamless implementation of the new eligibility and allocation decisions, effective at the start of the 2015 Federal fishing year. If NMFS tried to activate qualification and allocation decisions during the 2014 fishing year, after fishermen declared their areas, were issued trap tags, and issued state licenses, it would cause confusion amongst the fishermen and the affected state and Federal agencies and could complicate enforcement of trap limits and other lobster management measures.

NMFS will alleviate the burden on permit holders by attempting to align with allocative and eligibility decisions that the states have already made on dual permit holders. Since a dual permit holder's Federal and state fishing history are one and the same, NMFS will accept the state's decision as a valid form of eligibility. Those who have been qualified by their state will be notified by NMFS that information exists to suggest that they qualify, which will substantially reduce the burden on applicants who would otherwise need to provide documents in support of the eligibility criteria.

Recognizing that some permit holders have already transferred traps or may have different allocations than what NMFS can acknowledge, we incorporated a Director's Appeal provision into the qualification and allocation process. In the event that an allocation decision cannot be adopted by NMFS, the applicant's state fisheries director can appeal on his or her

behalf and declare why allowing the applicant to qualify or have a certain allocation will benefit the industry and resource. In the event that a permit holder's state and Federal allocations do not align, the permit holder may opt to maintain the higher of the two allocations, but he or she would be prohibited from transferring traps.

Small Business Regulatory Enforcement and Fairness Act

Section 212 of the Small Business Regulatory Enforcement and Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency will publish one or more guides to assist small entities in complying with the rule, and will designate such publications as "small entity compliance guides." The agency will explain the actions a small entity is required to take to comply with a rule or group of rules. As part of this rulemaking process, a letter to permit holders that also serves as a small entity compliance guide was prepared. Copies of this final rule are available from the Greater Atlantic Regional Fisheries Office, and the small entity compliance guide will be sent to all Federal lobster permit holders. The small entity compliance guide and this final rule will be available upon request and will be posted on the Greater Atlantic Regional Fisheries Office website at <http://www.nero.noaa.gov/sfd/lobster>.

Paperwork Reduction Act

This final rule contains a collection-of-information requirement subject to the Paperwork Reduction Act (PRA) and which has been approved by OMB under control number 0648-0673. Public reporting burden for this action is estimated as follows, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information:

- For Group 1 applicants to the Outer Cape and/or Area 2 Limited Access Program – 2 min per response;
- For Group 2 and 3 applicants to the Outer Cape and/or Area 2 Limited Access Program – 22 min per response;
- For Group 4 applicants to the Outer Cape and/or Area 2 Limited Access Program – 30 min per response;
- For Group 5 applicants to the Outer Cape and/or Area 2 Limited Access Program – 20 min per response; and
- For Trap Transfer Requests – 10 min per response.

Send comments regarding these burden estimates or any other aspect of this data collection, including suggestions for reducing the burden, to NMFS (see ADDRESSES) and by email to OIRA_Submission@omb.eop.gov, or fax to 202-395-7285.

Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to the penalty for failure to comply with, a collection of information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB control number.

List of Subjects in 50 CFR Part 697

Fisheries, fishing.

Dated: March 31, 2014

Samuel D. Rauch III,
Deputy Assistant Administrator for Regulatory Programs,
National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 697 is amended as follows:

PART 697 – ATLANTIC COASTAL FISHERIES COOPERATIVE MANAGEMENT

1. The authority citation for part 697 continues to read as follows:

Authority: 16 U.S.C. 5101 et seq.

2. In § 697.4, revise paragraph (a)(7)(ii), remove paragraphs (a)(7)(vii) through (xi), and add new paragraphs (a)(7)(vii) and (viii) to read as follows:

§ 697.4 Vessel permits and trap tags.

(a) * * *

(7) * * *

(ii) Each owner of a fishing vessel that fishes with traps capable of catching lobster must declare to NMFS in his/her annual application for permit renewal which management areas, as described in § 697.18, the vessel will fish in for lobster with trap gear during that fishing season. The ability to declare into Lobster Conservation Management Areas 1, 2, 3, 4, 5, and/or the Outer Cape Management Area, is first contingent upon a one-time initial qualification. The Area

3, 4, and 5 qualification programs are concluded and the Area 1, 2, and Outer Cape Area qualification programs are set forth in paragraphs (a)(7)(vi) through (a)(7)(viii) of this section.

* * * * *

(vii) Participation requirements for EEZ Nearshore Outer Cape Area (Outer Cape Area).

To fish for lobster with traps in the EEZ portion of the Outer Cape Area, a Federal lobster permit holder must apply for access in an application to the Regional Administrator. The application process is set forth as follows:

(A) Qualification criteria. To initially qualify into the EEZ portion of the Outer Cape Area, the applicant must establish with documentary proof the following:

- (1) That the applicant possesses a current Federal lobster permit;
- (2) That the applicant landed lobster caught in traps from the Outer Cape Area in either 1999, 2000, or 2001. Whichever year used shall be considered the qualifying year for the purposes of establishing the applicant's Outer Cape Area trap allocation;

(B) Trap allocation criteria. To receive a trap allocation for the EEZ portion of the Outer Cape Area, the qualified applicant must also establish with documentary proof the following:

- (1) The number of lobster traps fished by the qualifying vessel in 2000, 2001, and 2002;
and
- (2) The total pounds of lobster landed in 2000, 2001, and 2002.

(C) Trap allocation formula. The Regional Administrator shall allocate traps for use in the Outer Cape Area based upon the applicant's highest level of Effective Traps Fished during the qualifying year. Effective Traps Fished shall be the lower value of the maximum number of traps reported fished for that qualifying year compared to the predicted number of traps that is required to catch the reported poundage of lobsters for that year as set forth in the Commission's

allocation formula identified in Addendum XIII to Amendment 3 of the Commission's Interstate Fishery Management Plan for American Lobster.

(D) Documentary proof. To satisfy the Outer Cape Area Qualification and Trap Allocation Criteria set forth in paragraphs (a)(7)(vii)(A) and (B) of this section, the applicants will be limited to the following documentary proof:

(1) As proof of a valid Federal lobster permit, the applicant must provide a copy of the vessel's current Federal lobster permit. The potential qualifier may, in lieu of providing a copy, provide NMFS with such data that will allow NMFS to identify the Federal lobster permit in its database, which will at a minimum include: The applicant's name and address; vessel name; and permit number.

(2) As proof of traps fished in the Outer Cape Area and lobsters landed from the Outer Cape Area in 2000, 2001, or 2002, the applicant must provide the documentation reported to the state of the traps fished and lobsters landed during any of those years, as follows:

(i) State records. An applicant must provide documentation of his or her state reported traps fished and lobster landings in 2000, 2001, or 2002. The Regional Administrator shall presume that the permit holder was truthful and accurate when reporting to his or her state the traps fished and lobster landed in 2000, 2001, and 2002, and that the state records of such are the best evidence of traps fished and lobster landed during those years.

(ii) State decision. An applicant may provide his or her state's qualification and allocation decision to satisfy the documentary requirements of this section. The Regional Administrator shall accept a state's qualification and allocation decision as prima facie evidence in support of the Federal qualification and allocation decision. The Regional Administrator shall presume that the state decision is appropriate, but that presumption is rebuttable and the Regional

Administrator may choose to disallow the use of the state decision if the state decision was incorrect or based on factors other than those set forth in this section. This state decision may include not only the initial state qualification and allocation decision, but may also incorporate state trap transfer decisions that the state allowed since the time of the initial allocation decision.

(iii) States lacking reporting. An applicant may provide Federal vessel trip reports, dealer records, or captain's logbook as documentation in lieu of state records if the applicant can establish by clear and convincing evidence that the involved state did not require the permit holder to report traps or landings during 2000, 2001, or 2002.

(E) Application period. Applicants will have 180 days to submit an application. The time period for submitting an application for access to the EEZ portion of the Outer Cape Area begins on [insert date 30 days after date of publication of this final rule in the Federal Register] (application period start date) and ends [insert date 210 days after date of publication of this final rule in the Federal Register]. Failure to apply for Outer Cape Management Area access by that date shall be considered a waiver of any future claim for trap fishery access into the Outer Cape Area.

(F) Appeal of denial of permit. Any applicant having first applied for initial qualification into the Outer Cape Area trap fishery pursuant to this section, but having been denied access or allocation, may appeal to the Regional Administrator within 45 days of the date indicated on the notice of denial. Any such appeal must be in writing. Appeals may be submitted in the following two situations:

(1) Clerical Appeal. The grounds for Clerical Appeal shall be that the Regional Administrator erred clerically in concluding that the vessel did not meet the criteria in paragraph (a)(7)(vii) of this section. Errors arising from oversight or omission such as ministerial,

mathematical, or typographical mistakes would form the basis of such an appeal. Alleged errors in substance or judgment do not form a sufficient basis of appeal under this paragraph. The appeal must set forth the basis for the applicant's belief that the Regional Administrator's decision was made in error. If the appealing applicant does not clearly and convincingly prove that an error occurred, the appeal must be denied.

(2) Director's Appeal. A state's marine fisheries agency may appeal on behalf of one of its state permit holders. The only grounds for a Director's Appeal shall be that the Regional Administrator's decision on a dual permit holder's Federal permit has created a detrimental incongruence with the state's earlier decision on that permit holder's state permit. In order to pursue a Director's Appeal, the state must establish the following by a preponderance of the evidence:

(i) Proof of an incongruence. The state must establish that the individual has a state lobster permit that the state has qualified for access with traps into the Outer Cape Area, as well as a Federal lobster permit that the Regional Administrator has denied access or restricted the permit's trap allocation into the Outer Cape Area. The state must establish that the incongruent permits were linked during the year or years used in the initial application such that the fishing history used in Federal and state permit decisions was the same.

(ii) Proof of detriment. The state must provide a letter supporting the granting of trap access for the Federal permit holder. In the support letter, the state must explain how the incongruence in this instance is detrimental to the Outer Cape Area lobster fishery and why granting the appeal is, on balance, in the best interests of the fishery overall. A showing of detriment to the individual permit holder is not grounds for this appeal and will not be considered relevant to the decision.

(G) Appellate timing and review. All appeals must be submitted to the Regional Administrator in writing and reviewed as follows:

(1) Clerical Appeals timing. Applicants must submit Clerical Appeals no later than 45 days after the date on the NMFS Notice of Denial of the Initial Qualification Application. NMFS shall consider the appeal's postmark date as constituting the submission date for the purposes of determining timing. Failure to register an appeal within 45 days of the date of the Notice of Denial will preclude any further appeal. The appellant may notify the Regional Administrator in writing of his or her intent to appeal within the 45 days and request a time extension to procure the necessary documentation. Time extensions shall be limited to 30 days and shall be calculated as extending 30 days beyond the initial 45-day period that begins on the original date on the Notice of Denial. Appeals submitted beyond the deadlines stated herein will not be accepted.

(2) Director's Appeals timing. State Directors must submit Director's Appeals on behalf of their constituents no later than 180 days after the date of the NMFS Notice of Denial of the Initial Qualification Application. NMFS shall consider the appeal's postmark date as constituting the submission date for the purposes of determining timing. Failure to register an appeal within 180 days of the date of the Notice of Denial will preclude any further appeal. The Director may notify the Regional Administrator in writing of his or her intent to appeal within the 180 days and request a time extension to procure the necessary documentation. Time extensions shall be limited to 30 days and shall be calculated as extending 30 days beyond the initial 180-day period that begins on the original date on the Notice of Denial. Appeals submitted beyond the deadline will not be accepted.

(3) Agency response. Upon receipt of a complete written appeal with supporting documentation in the time frame allowable, the Regional Administrator will then appoint an appeals officer who will review the appellate documentation. After completing a review of the appeal, the appeals officer will make findings and a recommendation, which shall be advisory only, to the Regional Administrator, who shall make the final agency decision whether to qualify the applicant.

(H) Status of vessels pending appeal. The Regional Administrator may authorize a vessel to fish with traps in the Outer Cape Area during an appeal. The Regional Administrator may do so by issuing a letter authorizing the appellant to fish up to 800 traps in the Outer Cape Area during the pendency of the appeal. The Regional Administrator's letter must be present onboard the vessel while it is engaged in such fishing in order for the vessel to be authorized. If the appeal is ultimately denied, the Regional Administrator's letter authorizing fishing during the appeal will become invalid 5 days after receipt of the notice of appellate denial, or 15 days after the date on the notice of appellate denial, whichever occurs first.

(viii) Participation requirements for EEZ nearshore lobster management area 2 (Area 2). To fish for lobster with traps in the EEZ portion of Area 2, a Federal lobster permit holder must apply for access in an application to the Regional Administrator. The application process is as follows:

(A) Qualification criteria. To initially qualify into the EEZ portion of Area 2, the applicant must establish with documentary proof the following:

(1) That the applicant possesses a current Federal lobster permit;

(2) That the applicant landed lobster caught in traps from Area 2 in 2001, 2002, or 2003. Whichever year used shall be considered the qualifying year for the purposes of establishing the applicant's Area 2 trap allocation;

(B) Trap allocation criteria. To receive a trap allocation for the EEZ portion of Area 2, the qualified applicant must also establish with documentary proof the following:

- (1) The number of lobster traps fished by the qualifying vessel in the qualifying year; and
- (2) The total pounds of lobster landed during that qualifying year.

(C) Trap allocation formula. The Regional Administrator shall allocate traps for use in Area 2 based upon the applicant's highest level of Effective Traps Fished during the qualifying year. Effective Traps Fished shall be the lower value of the maximum number of traps reported fished for that qualifying year compared to the predicted number of traps that is required to catch the reported poundage of lobsters for that year as set forth in the Commission's allocation formula identified in Addendum VII to Amendment 3 of the Commission's Interstate Fishery Management Plan for American Lobster.

(D) Documentary proof. To satisfy the Area 2 Qualification and Trap Allocation Criteria set forth in paragraphs (a)(7)(viii)(A) and (B) of this section, the applicants will be limited to the following documentary proof:

(1) As proof of a valid Federal lobster permit, the applicant must provide a copy of the vessel's current Federal lobster permit. The potential qualifier may, in lieu of providing a copy, provide NMFS with such data that will allow NMFS to identify the Federal lobster permit in its database, which will at a minimum include: The applicant's name and address; vessel name; and permit number.

(2) As proof of traps fished in Area 2 and lobsters landed from Area 2 in 2001, 2002, or 2003, the applicant must provide the documentation reported to the state of the traps fished and lobsters landed during any of those years as follows:

(i) State records. An applicant must provide documentation of his or her state reported traps fished and lobster landings in 2001, 2002, or 2003. The landings must have occurred in a state adjacent to Area 2, which the Regional Administrator shall presume to be limited to Massachusetts, Rhode Island, Connecticut, and/or New York. The Regional Administrator shall presume that the permit holder was truthful and accurate when reporting to his or her state the traps fished and lobster landed in 2001, 2002, and 2003 and that the state records of such are the best evidence of traps fished and lobster landed during those years.

(ii) State decision. An applicant may provide his or her state's qualification and allocation decision to satisfy the documentary requirements of this section. The Regional Administrator shall accept a state's qualification and allocation decision as prima facie evidence in support of the Federal qualification and allocation decision. The Regional Administrator shall presume that the state decision is appropriate, but that presumption is rebuttable and the Regional Administrator may choose to disallow the use of the state decision if the state decision was incorrect or based on factors other than those set forth in this section. This state decision may include not only the initial state qualification and allocation decision, but may also incorporate state trap transfer decisions that the state allowed since the time of the initial allocation decision.

(iii) States lacking reporting. An applicant may provide Federal vessel trip reports, dealer records, or captain's logbook as documentation in lieu of state records if the applicant can establish by clear and convincing evidence that the involved state did not require the permit holder to report traps or landings during 2001, 2002, or 2003.

(E) Application period. Applicants will have 180 days to submit an application. The time period for submitting an application for access to the EEZ portion of Area 2 begins on [insert date 30 days after date of publication of this final rule in the Federal Register] (application period start date) and ends [insert date 210 days after date of publication of this final rule in the Federal Register]. Failure to apply for Area 2 access by that date shall be considered a waiver of any future claim for trap fishery access into Area 2.

(F) Appeal of denial of permit. Any applicant having first applied for initial qualification into the Area 2 trap fishery pursuant to this section, but having been denied access, may appeal to the Regional Administrator within 45 days of the date indicated on the notice of denial. Any such appeal must be in writing. Appeals may be submitted in the following three situations:

(1) Clerical Appeal. The grounds for Clerical Appeal shall be that the Regional Administrator clerically erred in concluding that the vessel did not meet the criteria in paragraph (a)(7)(viii) of this section. Errors arising from oversight or omission, such as ministerial, mathematical, or typographical mistakes, would form the basis of such an appeal. Alleged errors in substance or judgment do not form a sufficient basis of appeal under this paragraph. The appeal must set forth the basis for the applicant's belief that the Regional Administrator's decision was made in error. If the appealing applicant does not clearly and convincingly prove that an error occurred, the appeal must be denied.

(2) Medical or Military Hardship Appeal. The grounds for a Hardship Appeal shall be limited to those situations in which medical incapacity or military service prevented a Federal lobster permit holder from fishing for lobster in 2001, 2002, and 2003. If the Federal lobster permit holder is able to prove such a hardship, then the individual shall be granted the additional years of 1999 and 2000 from which to provide documentary proof in order to qualify for and fish

traps in Area 2. In order to pursue a Hardship Appeal, the applicant must establish the following by a preponderance of the evidence:

(i) Proof of medical incapacity or military service. To prove incapacity, the applicant must provide medical documentation from a medical provider, or military service documentation from the military, that establishes that the applicant was incapable of lobster fishing in 2001, 2002, and 2003. An applicant may provide his/her state's qualification and allocation appeals decision to satisfy the documentary requirements of this section. The Regional Administrator shall accept a state's appeals decision as prima facie evidence in support of the Federal decision on the appeal. The Regional Administrator shall presume that the state decision is appropriate, but that presumption is rebuttable and the Regional Administrator may choose to disallow the use of the state decision if the state decision was incorrect or based on factors other than those set forth in this section.

(ii) Proof of Area 2 trap fishing in 1999 and 2000. To prove a history of Area 2 lobster trap fishing in 1999 and/or 2000, the applicant must provide documentary proof as outlined in paragraph (a)(7)(viii)(D) of this section.

(3) Director's Appeal. A state's marine fisheries agency may appeal on behalf of one of its state permit holders. The only grounds for a Director's Appeal shall be that the Regional Administrator's decision on a dual permit holder's Federal permit has created a detrimental incongruence with the state's earlier decision on that permit holder's state permit. In order to pursue a Director's Appeal, the state must establish the following by a preponderance of the evidence:

(i) Proof of an incongruence. The state must establish that the individual has a state lobster permit, which the state has qualified for access with traps into Area 2, as well as a Federal

lobster permit, which the Regional Administrator has denied access or restricted the permit's trap allocation into Area 2. The state must establish that the incongruent permits were linked during the year or years used in the initial application such that the fishing history used in Federal and state permit decisions was the same.

(ii) Proof of detriment. The state must provide a letter supporting the granting of trap access for the Federal permit holder. In the support letter, the state must explain how the incongruence in this instance is detrimental to the Area 2 lobster fishery and why granting the appeal is, on balance, in the best interests of the fishery overall. A showing of detriment to the individual permit holder is not grounds for this appeal and will not be considered relevant to the decision.

(G) Appellate timing and review. All appeals must be submitted to the Regional Administrator in writing and reviewed as follows:

(1) Clerical Appeals timing. Applicants must submit Clerical Appeals no later than 45 days after the date on the NMFS Notice of Denial of the Initial Qualification Application. NMFS shall consider the appeal's postmark date as constituting the submission date for the purposes of determining timing. Failure to register an appeal within 45 days of the date of the Notice of Denial will preclude any further appeal. The appellant may notify the Regional Administrator in writing of his or her intent to appeal within the 45 days and request a time extension to procure the necessary documentation. Time extensions shall be limited to 30 days and shall be calculated as extending 30 days beyond the initial 45-day period that begins on the original date on the Notice of Denial. Appeals submitted beyond the deadlines stated herein will not be accepted.

(2) Medical or Military Hardship Appeals timing. Applicants must submit Medical or Military Hardship Appeals no later than 45 days after the date on the NMFS Notice of Denial of the Initial Qualification Application. NMFS shall consider the appeal's postmark date as constituting the submission date for the purposes of determining timing. Failure to register an appeal within 45 days of the date of the Notice of Denial will preclude any further appeal. The appellant may notify the Regional Administrator in writing of his or her intent to appeal within the 45 days and request a time extension to procure the necessary documentation. Time extensions shall be limited to 30 days and shall be calculated as extending 30 days beyond the initial 45-day period that begins on the original date on the Notice of Denial. Appeals submitted beyond the deadlines stated herein will not be accepted.

(3) Director's Appeals timing. State Directors must submit Director's Appeals on behalf of their constituents no later than 180 days after the date of the NMFS Notice of Denial of the Initial Qualification Application. NMFS shall consider the appeal's postmark date as constituting the submission date for the purposes of determining timing. Failure to register an appeal within 180 days of the date of the Notice of Denial will preclude any further appeal. The Director may notify the Regional Administrator in writing of his or her intent to appeal within the 180 days and request a time extension to procure the necessary documentation. Time extensions shall be limited to 30 days and shall be calculated as extending 30 days beyond the initial 180-day period that begins on the original date on the Notice of Denial. Appeals submitted beyond the deadline will not be accepted.

(4) Agency response. Upon receipt of a complete written appeal with supporting documentation in the time frame allowable, the Regional Administrator will appoint an appeals officer who will review the appellate documentation. After completing a review of the appeal,

the appeals officer will make findings and a recommendation, which shall be advisory only, to the Regional Administrator, who shall make the final agency decision whether to qualify the applicant.

(H) Status of vessels pending appeal. The Regional Administrator may authorize a vessel to fish with traps in Area 2 during an appeal. The Regional Administrator may do so by issuing a letter authorizing the appellant to fish up to 800 traps in Area 2 during the pendency of the appeal. The Regional Administrator's letter must be present onboard the vessel while it is engaged in such fishing in order for the vessel to be authorized. If the appeal is ultimately denied, the Regional Administrator's letter authorizing fishing during the appeal will become invalid 5 days after receipt of the notice of appellate denial or 15 days after the date on the notice of appellate denial, whichever occurs first.

* * * * *

3. In § 697.7, add paragraph (c)(1)(xxx) to read as follows:

§ 697.7 Prohibitions.

* * * * *

(c) ***

(1) ***

(xxx) Outer Cape Area seasonal closure. The Federal waters of the Outer Cape Area shall be closed to lobster fishing with traps by Federal lobster permit holders from January 15 through March 15.

(A) Lobster fishing with traps is prohibited in the Outer Cape Area during this seasonal closure. Federal trap fishers are prohibited from possessing or landing lobster taken from the Outer Cape Area during the seasonal closure.

(B) All lobster traps must be removed from Outer Cape Area waters before the start of the seasonal closure and may not be re-deployed into Outer Cape Area waters until after the seasonal closure ends. Federal trap fishers are prohibited from setting, hauling, storing, abandoning or in any way leaving their traps in Outer Cape Area waters during this seasonal closure. Federal lobster permit holders are prohibited from possessing or carrying lobster traps aboard a vessel in Outer Cape Area waters during this seasonal closure unless the vessel is transiting through the Outer Cape Area pursuant to paragraph (c)(1)(xxx)(D) of this section.

(C) The Outer Cape Area seasonal closure relates only to the Outer Cape Area. The restrictive provisions of §§ 697.3 and 697.4(a)(7)(v) do not apply to this closure. Federal lobster permit holders with an Outer Cape Area designation and another Lobster Management Area designation on their Federal lobster permit would not have to similarly remove their lobster gear from the other designated management areas.

(D) Transiting Outer Cape Area. Federal lobster permit holders may possess lobster traps on their vessel in the Outer Cape Area during the seasonal closure only if:

(1) The trap gear is stowed; and

(2) The vessel is transiting the Outer Cape Area. For the purposes of this section, transiting shall mean passing through the Outer Cape Area without stopping to reach a destination outside the Outer Cape Area.

(E) The Regional Administrator may authorize a permit holder or vessel owner to haul ashore lobster traps from the Outer Cape Area during the seasonal closure without having to engage in the exempted fishing process in § 697.22, if the permit holder or vessel owner can establish the following:

(1) That the lobster traps were not able to be hauled ashore before the seasonal closure due to incapacity, vessel/mechanical inoperability, and/or poor weather; and

(2) That all lobsters caught in the subject traps will be immediately returned to the sea.

(F) The Regional Administrator may condition the authorization described in paragraph (c)(1)(xxx)(E) as appropriate in order to maintain the overall integrity of the closure.

* * * * *

4. Revise § 697.19 to read as follows:

§ 697.19 Trap limits and trap tag requirements for vessels fishing with lobster traps.

(a) Area 1 trap limits. The Area 1 trap limit is 800 traps. Federally permitted lobster fishing vessels shall not fish with, deploy in, possess in, or haul back more than 800 lobster traps in Area 1.

(b) Area 2 trap limits. The Area 2 trap limit is 800 traps. Federally permitted lobster fishing vessels may only fish with traps that have been previously qualified and allocated into Area 2 by the Regional Administrator. This allocation may be modified by trap cuts and/or trap transfers, but in no case shall the allocation exceed the trap limit.

(c) Area 3 trap limits. The Area 3 trap limit is 1,945 traps. Federally permitted lobster fishing vessels may only fish with traps that have been previously qualified and allocated into Area 3 by the Regional Administrator. This allocation may be modified by trap cuts and/or trap transfers, but in no case shall the allocation exceed the trap limit.

(d) Area 4 trap limits. The Area 4 trap limit is 1,440 traps. Federally permitted lobster fishing vessels may only fish with traps that have been previously qualified and allocated into Area 4 by the Regional Administrator. This allocation may be modified by trap cuts and/or trap transfers, but in no case shall the allocation exceed the trap limit.

(e) Area 5 trap limits. The Area 5 trap limit is 1,440 traps, unless the vessel is operating under an Area 5 Trap Waiver permit issued under § 697.26. Federally permitted lobster fishing vessels may only fish with traps that have been previously qualified and allocated into Area 5 by the Regional Administrator. This allocation may be modified by trap cuts and/or trap transfers, but in no case shall the allocation exceed the trap limit.

(f) Outer Cape Area. The Outer Cape Area trap limit is 800 traps. Federally permitted lobster fishing vessels may only fish with traps that have been previously qualified and allocated into the Outer Cape Area by the Regional Administrator. This allocation may be modified by trap cuts and/or trap transfers, but in no case shall the allocation exceed the trap limit.

(g) Lobster trap limits for vessels fishing or authorized to fish in more than one EEZ management area. A vessel owner who elects to fish in more than one EEZ Management Area is restricted to the lowest trap limit of those areas and may not fish with, deploy in, possess in, or haul back from any of those elected management areas more lobster traps than the lowest number of lobster traps allocated to that vessel for any of the elected management areas.

(h) Conservation equivalent trap limits in New Hampshire state waters. Notwithstanding any other provision, any vessel with a Federal lobster permit and a New Hampshire Full Commercial Lobster license may fish up to a maximum of 1,200 lobster traps in New Hampshire state waters, to the extent authorized by New Hampshire lobster fishery regulations. However, such vessel may not fish, possess, deploy, or haul back more than 800 lobster traps in the Federal waters of EEZ Nearshore Management Area 1, and may not fish more than a combined total of 1,200 lobster traps in the Federal and New Hampshire state waters portions of EEZ Nearshore Management Area 1.

(i) Trap tag requirements for vessels fishing with lobster traps. Any lobster trap fished in Federal waters must have a valid Federal lobster trap tag permanently attached to the trap bridge or central cross-member. Any vessel with a Federal lobster permit may not possess, deploy, or haul back lobster traps in any portion of any management area that do not have a valid, federally recognized lobster trap tag permanently attached to the trap bridge or central cross-member.

(j) Maximum lobster trap tags authorized for direct purchase. In any fishing year, the maximum number of tags authorized for direct purchase by each permit holder is the applicable trap limit specified in paragraphs (a) through (f) of this section plus an additional 10 percent to cover trap loss.

(k) EEZ Management Area 5 trap waiver exemption. Any vessel issued an Area 5 Trap Waiver permit under § 697.4(p) is exempt from the provisions of this section.

5. Add § 697.27 to read as follows:

§ 697.27 Trap transferability.

(a) Federal lobster permit holders may elect to participate in a program that allows them to transfer trap allocation to other participating Federal lobster permit holders, subject to the following conditions:

(1) Participation requirements. To be eligible to participate in the Federal Trap Transfer Program:

(i) An individual must possess a valid Federal lobster permit; and

(ii) If the individual is dually permitted with both Federal and state lobster licenses, the individual must agree to synchronize his or her state and Federal allocations in each area for which there is an allocation. This synchronization shall be set at the lower of the state or Federal

allocation in each area. This provision does not apply to Areas 1 and 6 as neither area have a Federal trap allocation.

(iii) Individuals participating in the Lobster Management Area 1 trap fishery may participate in the Trap Transfer Program, but doing so may result in forfeiture of future participation in the Area 1 trap fishery as follows:

(A) Area 1 fishers may accept, receive, or purchase trap allocations up to their Area 1 trap limit identified in § 697.19 and fish with that allocation both in Area 1 and the other area or areas subject to the restrictive provisions of § 697.3 and § 697.4(a)(7)(v).

(B) Area 1 fishers with trap allocations in Areas 2, 3, and/or the Outer Cape Area may transfer away or sell any portion of that allocation, but, in so doing, the Area 1 fisher shall forfeit any right to fish in Area 1 with traps in the future.

(2) Trap allocation transfers. Trap allocation transfers will be allowed subject to the following conditions:

(i) State/Federal alignment. Participants with dual state and Federal permits may participate in the Trap Transfer Program each year, but their state and Federal trap allocations must be aligned as required in paragraph (a)(1)(ii) of this section at the start and close of each trap transfer period.

(ii) Eligible traps. Buyers and sellers may only transfer trap allocations from Lobster Management Areas 2, 3, and the Outer Cape Area.

(iii) Debiting remaining allocation. The permit holder transferring trap allocations shall have his or her remaining Federal trap allocation in all Lobster Conservation Management Areas debited by the total amount of allocation transferred. This provision does not apply to Areas 1 and 6, as neither area have a Federal trap allocation. A seller may not transfer a trap allocation

if, after the transfer is debited, the allocation in any remaining Lobster Conservation Management Area would be below zero.

(iv) Crediting allocations for partial trap transfers. In a partial trap transfer, where the transfer is occurring independent of a Federal lobster permit transfer, the permit holder receiving the transferred allocation shall have his or her allocation credited as follows:

(A) Trap retirement. All permit holders receiving trap allocation transfers shall retire 10 percent of that transferred allocation from the fishery for conservation. This provision does not pertain to full business transfers where the transfer includes the transfer of a Federal lobster permit and all traps associated with that permit.

(B) Multi-area trap allocation history. To the extent that transferred trap allocations have been granted access into multiple management areas, the recipient may elect any and all management areas for which the traps have demonstrated history.

(C) All trap allocation transfers are subject to whatever trap allocation cap exists in the involved lobster management area. No participant may receive a transfer that, when combined with existing allocation, would put that permit holder's trap allocation above the involved trap caps in § 697.19.

(v) In all allocation transfers, the buyer's and seller's initial allocations shall be calculated as being the allocation that the buyer and seller would otherwise have on the last day of the fishing year.

(vi) Trap allocations may only be transferred in 10-trap increments.

(vii) Trap allocation transfers must be approved by the Regional Administrator before becoming effective. The Regional Administrator shall approve a transfer upon a showing by the involved permit holders of the following:

(A) The proposed transfer is documented in a legible written agreement signed and dated by the involved permit holders. The agreement must identify the amount of allocation being transferred as well as the Federal lobster permit number from which the allocation is being taken and the Federal lobster permit number that is receiving the allocation. If the transfer involves parties who also possess a state lobster license, the parties must identify the state lobster license number and state of issuance.

(B) That the transferring permit holder has sufficient allocation to transfer and that the permit holder's post-transfer allocation is clear and agreed to. In determining whether seller has sufficient allocation to transfer, the Regional Administrator will calculate the seller's pre-transfer and post-transfer allocations. The pre-transfer allocation shall be the amount of the seller's allocation as it would exist on the last day of the fishing year. The post-transfer allocation shall be the pre-transfer allocation minus the total amount of traps being transferred prior to application of the 10-percent trap retirement set forth in paragraph (a)(2)(iv)(A) of this section.

(C) That the permit holder receiving the transfer has sufficient room under any applicable trap cap identified in § 697.19 to receive the transferred allocation and that the recipient's post-transfer allocation is clear and agreed to. In determining whether the buyer has sufficient room to receive allocation, the Regional Administrator will calculate the buyer's pre-transfer and post-transfer allocations. The pre-transfer allocation shall be the amount of the buyer's allocation as it would exist on the last day of the fishing year. The post-transfer allocation shall be the pre-transfer allocation plus the total amount of traps being transferred minus 10 percent of the transferred allocation that shall be retired pursuant to the provisions of (a)(2)(iv)(A) of this section.

(3) Trap transfer period. The timing of the Trap Transfer Program is as follows:

(i) Federal lobster permit holders must declare their election into the program in writing to the NMFS Permit Office. Electing into the Trap Transfer Program is a one-time declaration, and the permit holder may participate in the program in later years without needing to re-elect into the program year after year. Federal permit holders may elect into the program at any time in any year, but their ability to actively transfer traps will be limited by the timing restrictions identified in paragraphs (a)(3)(ii) and (iii) of this section.

(ii) All trap transfer requests must be made in writing before September 30 each year, and if approved, will become effective at the start of the next fishing year. The Regional Administrator shall attempt to review, reconcile and notify the transferring parties of the disposition of the requested transfer before December 31 each year. Transfers are not valid until approved by the Regional Administrator.

(iii) Year 1. Notwithstanding paragraph (a)(3)(ii) of this section, the timing of the first year of the Trap Transfer Program is linked to the completion of the Commission's Trap Tag Database. NMFS will analyze the Trap Tag Database and when NMFS finds that the database is capable of tracking transfers for multiple jurisdictions, then NMFS will file a notice alerting the public of the date of when the Trap Transfer Program will begin.

(b) [Reserved]